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OCT. 8 1943
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IN THE

Supreme Court of the United States

October Term, 1943

No. 337.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT STOCKHOLDERS PUBLISHING COMPANY, INC. (337) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS S. TOBIN,
817 Board of Trade Building, Los Angeles,
Attorney for Respondent Stockholders Publishing Company, Inc.

BINFORD & BINFORD,
L. B. BINFORD,
HOWARD M. BINFORD,
Of Counsel.

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TOPICAL INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	3
"Specifications of Errors to be Urged"—(by petitioner)	6
Argument	7
Point I. The decision of the court below does not result in a conflict of decisions	7
Point II. Evidence to justify findings of an administrative body means substantial evidence	14
Point III. The word "Employee" was used by Congress in the National Labor Relations Act in its long established and conventional sense	17
Conclusion	20

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197	14, 15, 16
Gray v. Powell, 314 U. S. 402	9, 10, 11
Gunning v. Cooley, 281 U. S. 90	16
Jones v. Goodson (10 C. C. A.), 121 F. (2d) 176	18
Kentucky Cottage Industries v. Glenn, 39 Fed. Supp. 642	19
McDonald v. United States (8 C. C. A.) 89 F. (2d) 128	19
National Labor Relations Board v. Blount, 131 F. (2d) 585—318 U. S. 791	12, 13
National Labor Relations Board v. Boss Manufacturing Co., 107 Fed. (2d) 574	15
National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292	14, 15
National Labor Relations Board v. Goshen Rubber & Manufacturing Co., 110 Fed. (2d) 432	16
National Labor Relations Board v. Sterling Electric Motors, 109 Fed. (2d) 194	16
National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co., 135 Fed. (2d),	15
Robinson v. Baltimore & Ohio R. R. Co., 237 U. S. 84, at 94, 59 L. Ed. 849	18
Rochester Telephone Corporation v. U. S., 307 U. S. 125	12
Sanborn v. Commissioner (8 C. C. A.), 88 F. (2d) 134	19
Shields v. Utah Idaho Central R. Co., 305 U. S. 177	12
South Chicago Coal and Dock Co. v. Bassett, 309 U. S. 251	9, 10, 12
Sunshine Anthracite Coal Co. v. Adkins 310 U. S. 381	12, 13
Walker v. Altmeyer (C. C. A. 2) (decided July 12, 1943)	7

STATUTES.

	PAGE
Bituminous Coal Act, Sec. 4(a)	9
Federal Employers Liability Act (U. S. C. A., Title 45, Sec. 51)	18
Judicial Code, Sec. 240(a), as amended by the Act of February 13, 1925	2
Longshoremen's and Harbor Workers Compensation Act, 44 Stat. 1424; 33 U. S. C. and U. S. C. Supp. Sec. 901, et seq.	11
National Labor Relations Act, Sec. 2(3)	2, 6, 9, 17
National Labor Relations Act, Sec. 10(c)	2
National Labor Relations Act, Sec. 10(f)	2
29 United States Code Annotated 561, Sec. 201.1	17

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Respondent, STOCKHOLDERS PUBLISHING COMPANY, INC., publisher of the DAILY NEWS at Los Angeles, California (hereinafter referred to as "NEWS"), submits the following brief in opposition to the Petition of National Labor Relations Board for a Writ of Certiorari in case Number 337.

Opinion Below.

The opinion of the Circuit Court of Appeals—Ninth Circuit—is reported in 136 Federal (2d) 608.

Jurisdiction.

The Board's Petition for Writ of Certiorari was filed September 9, 1943. Notice of the filing of such petition, with copy thereof, and of the record, was served on counsel for this respondent on September 18, 1943. Jurisdiction of this Court is invoked under Section 240(a) of the

Judicial Code as amended by the Act of February 13, 1925, and Section 10(e) and (f) of the National Labor Relations Act.

Questions Presented.

This respondent submits that petitioner's "Questions Presented" is inaccurate in certain respects, notably

> Question 2: "Whether the Board properly found that persons who sell newspapers *subject to the supervision and control of the Publishing Company* are employees within the meaning of Section 2(3) of the Act." (Emphasis supplied.)

It is submitted that the clause "subject to the supervision and control of the Publishing Company" is improperly included as a part of the question in that it is thereby assumed that "supervision" and "control" are conceded and recognized, while as a matter of fact such supervision and control was one of the prime controversial questions.

It is further submitted that the scope of petitioner's question 3,

> "Whether the context of the Act furnishes the basis for a definition of employment broader in scope than the common law definition of a servant."

is too restrictive. Respondent would substitute for such question the following:

> Does the definition contained in the Act,[1] of the word "employee", justify any conclusion that it was intended that such word "employee" be used in any sense except according to the long established and common acceptation of the term?

[1] Sec. 2(3)—N. L. R. A. "The term 'Employee' shall include any Employee."

Statement.

Respondent takes exception in certain respects to petitioner's statement in summarizing the evidence.

Petitioner states (p. 6) that

> "The newsboys are 'hired' and 'fired', disciplined, directed, and supervised by respondents through supervisory employees known as the 'district manager' or the 'district man'."

The record references given as to the NEWS fail to support the statement, and the entire record discloses the fact that respondent has consistently denied that it ever "employed" any district managers and there is no substantial evidence to the contrary in the entire record.

Petitioner further states (p. 6) that

> "The district managers keep lists of the newsboys in their districts, the locations where they are stationed, the quota assigned to each boy, the names of checkmen or 'main spot' boys through whom they distribute, and the amount so sub-distributed."

The reference given as to the NEWS consists of merely an exhibit containing a list of "checkmen", and does not at all support the foregoing statement.

Again, at page 6, petitioner states in substance that the District Managers determine the number of newspapers to be taken out each day, and sometimes treble or double the usual number. The reference offered to sup-

port this statement in so far as the NEWS is concerned does not support the same.[2]

It is submitted that none of the references offered by petitioner, at page 7, support the statement that the District Managers of the NEWS

> "recommend newsboys for discharge, discipline or reprimand. . . ."[3]

Further, petitioner states (p. 8):

> "The newsboy obtains employment *by applying at the plant* to the district manager, who then assigns him to a particular spot, if an opening is available." (Emphasis supplied.)

This statement is not supported by references offered as to the NEWS.

Petitioner states (p. 8):

> "All respondents also furnish transportation to the newsboys from the plant to their respective corners, and after work is over bring them back."

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[2](789)—Question by counsel for respondent NEWS:

"Q. Do you get full returns on the NEWS? A. I do.

Q. You can regulate your orders in any way you want? A. The District Man regulates the orders but he gives me full returns. *He don't tell me how many papers I should have.* . . ." (Emphasis supplied.)

[3]The references disclose the fact that in one instance a NEWS District Man questioned a newsboy as to why he had been off of his corner, and was advised by the newsboy that he had been sick and that he (the newsboy) had employed his own relief man [R. 733, 737-738]. The other reference refers to the statement of a newsboy that he had been told how to use a display rack, and he stated that he knew how to use it without any instructions [R. 777-78].

Three references are given to support this statement as to the NEWS—R. 1157 refers to another respondent. R. 1171 refers to another respondent. R. 1115 justifies the statement only to the extent that a District Man for the NEWS testified that he picked up some of the boys and brought them to their corners. No statement was made to the effect that he picked them up at the plant or to the effect that he returned them from their work, nor that such or any such practice was common amongst District Men of the NEWS.

Petitioner does not even endeavor to support, as to the NEWS, the statement made on page 8 that the newsboys are subject

> "to removal at will and to transfer or disciplinary lay-offs by the District Managers."

We find no support in the record for the statement appearing on page 12 to the effect that newsboys were regarded by representatives of this respondent as employees, and we submit that the statement at the foot of page 11, to the effect that checkmen and newsboys regarded themselves as employees, is immaterial.

"Specifications of Errors to Be Urged"—(by Petitioner).

It is submitted that petitioner erred in suggesting that the Circuit Court of Appeals erred

> "in holding that the Board's denial of Respondent's claim of exemption from the Statute was improper."

This respondent made no such or any claim of exemption from the statute, nor do we find anything in the opinion of the Court purporting to pass upon any alleged claim of exemption.

Respondent has consistently contended that the Board was without jurisdiction by reason of the absence of the employer-employee relationship, and has at no time claimed or even made reference to an "exemption." The only "exemption" referred to in the National Labor Relations Act of which respondent is aware, is found in Section 2(3):

> "The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

Respondent has not and does not maintain that newsboys selling its papers come within any such exceptions or exemptions.

ARGUMENT.

POINT I.

The Decision of the Court Below Does Not Result in a Conflict of Decisions.

The Court stated in the case of *Walker v. Altmeyer*, (C. C. A. 2) (decided July 12, 1943) and cited and relied upon by petitioner, as an example of a conflict of decisions, as follows:[4]

> "The facts underlying that (the Referee's) decision *which were found on substantial evidence*[5] were of course binding on the District Court. . . . It was the judgment of the administrative body as to employer-employee relationship rather than that of the Court which the statute made effective *provided*[6] that judgment was based upon conclusions reasonably reached upon due consideration of all relevant issues presented."[6]

In the case at bar the Court below stated (Opinion, P. 1849—106 Fed. (2d) 613):

> "The question for decision as to each newspaper separate from any other paper is whether there is *substantial evidence*[5] that the publisher exercises, or has the right to exercise, sufficient control over the activity of the newsboys defined in its appropriate unit to support the Board's decision that they were employees under Section 2(3) of the National Labor Relations Act."

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[4]Exact page not ascertainable at this writing.

[5]All emphasis ours.

[6]Which is to say, in effect, provided the judgment of the administrative body was based upon substantial evidence.

and then states (P. 1850):

> ". . . We believe even though all the testimony be applied to all petitioners, or that induced upon behalf of each be applied to it alone, *that there is not substantial evidence herein*[7] to support the Board's determination that the newsboys are 'employees' of the publishers. . . ."

Again at the conclusion of its Decision (P. 1851) the Court states, as follows:

> "We think the Board is not supported by *substantial evidence*[7] in its finding that the 'newsboys' are employees of the publishers whose newspaper they vend."

Certainly the foregoing decisions therefore are not in conflict.

The difference between the controlling decision of the Court below in the instant case and the dissenting opinion[8] can be briefly stated as follows:

The Court held that there was no substantial evidence from which the Board could reasonably draw an inference of the employer-employee relationship. The dissenting opinion while conceding the right of the Circuit Court to determine whether or not the Board could reasonably infer such relationship from the evidence before it[9]

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[7]Emphasis ours.

[8]Referred to on page 12 of the Petition for Writ of Certiorari.

[9]Dissenting Opinion, p. 1852—136 Fed. (2d) 614:

> ". . . The sole question before us is whether the Board reasonably could infer from the varied incidents of the relationship between the men and the publishers, that it is one of employer and employee."

concluded that it, the Board, could so do, while the controlling opinion found that there was not substantial evidence to support the findings.

Nor is the decision of the Court below in the case at bar in conflict with the case of *Gray v. Powell*, 314 U. S. 402, or *South Chicago Coal and Dock Co. v. Bassett*, 309 U. S. 251.

Gray v. Powell, supra, involved the determination by the director of the Bituminous Coal Division of the question of whether or not a railroad company was a "producer" of coal. Under the provisions of the Bituminous Coal Act (particularly Section 4(a)) the matter of the determination of such question was specifically delegated by Congress to the Commission. No such delegation with respect to the determination of the meaning of the word "employee" was made by Congress in the National Labor Relations Act—rather was the word "employee" given (in effect) by the provisions of Section 2(3) of the Act, its ordinary and conventional meaning.

The Court stated in *Gray v. Powell, supra*, after discussing the delegation of certain powers to the administrative body, as follows (p. 411):

> "Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual exemptions from the Code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer

> consumption upon the other. . . . . where as here *a determination has been left to an administrative body*[10] this delegation will be respected and the administrative conclusion left untouched."

Even where such matters are specifically delegated by Congress to an administrative body as in the case of *Gray v. Powell, supra*, this Court was still careful to preserve a right of review of the acts of the administrative body, stating at page 411:

> "In a matter left *specifically*[10] by Congress to the determination of an administrative body, as the question of exemption was here by Secs. 4-II(1) and 4-A, the function of review placed upon the Courts by Sec. 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and *an application of the statute in a just and reasoned manner.*"[10]

and continuing at page 413:

> "Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed."

The case of *South Chicago Co. v. Bassett, supra*, turned on the question of whether or not a certain employee of the petitioner who met death while engaged in performing certain work for petitioner, was a member of a "crew" within the meaning of Longshoremen's and Harbor Work-

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[10]Emphasis ours.

ers Compensation Act, 44 Stat. 1424; 33 U. S. C. and U. S. C. Supp. Sec. 901 *et seq.*, in which Act the term "employee" was restrictively defined as follows:

> "The term 'employee' does not include a master or member of a crew of any vessel nor any person engaged . . . to load or unload . . . any small vessel. . . ."

After pointing out (p. 257) that the determination of the question of whether or not the deceased was "a member of a crew" had been confided by Congress to the Deputy Commissioner, the Court stated, page 258:

> "Hence the Court of Appeals correctly ruled that his (Deputy Commissioner's) finding, *if there was evidence to support it*," was conclusive and that *it was the duty of the District Court to ascertain whether it was so supported*" and, if so, to give it effect without attempting a retrial."

It will again be observed that this Court, even where authority to determine certain specific facts has been delegated by Congress, reserves the absolute right to determine whether the conclusions reached by the administrative body were justified and whether or not the evidence adduced was sufficient to support such conclusions. It is significant that the Supreme Court duly considered and discussed, in its opinion in the "Bassett" case, the evidence adduced before the Commission, which statement can be applied with like effect to the case of *Gray v. Powell, supra*. Indicating rather conclusively that the right of the Courts to determine the sufficiency of evidence adduced before an administrative body or the reasonableness of the application of such evidence in support of findings is not to be

impaired—any other conclusion would result in the sapping of judicial power as it exists under the Constitution of the United States.

A further important distinction should be noted between the case at bar and the case of *South Chicago Co. v. Bassett, supra.* In that case petitioners urged that the question of whether or not the decedent was a member of a crew was a question of law. This Court held that (p. 258):

> "The word 'crew' does not have an absolute unvarying legal significance."

and at some length explained its various meanings. This, it is respectfully submitted, is not true with respect to the word "employee" which has a well established and conventional meaning under the common law and statutory enactments.

There appears to be no conflict in the decision of the Court below with the decision of the 8th Circuit in *National Labor Relations Board v. Blount*, 131 F. (2d) 585—318 U. S. 791, cited by counsel.

An analysis of the cases of *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, and *Rochester Telephone Corporation v. U. S.*, 307 U. S. 125, and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, does not disclose any departure by the Court from the rule or principals herein contended for.

For example, the case of *Shields v. Utah Idaho Central R. Co., supra*, involved the status of respondent as to whether or not it was an inter-urban electric railway, the Act providing that if it was, it was excepted from the provisions therefrom. There appeared to be no controversy respecting the meaning of the term "inter-urban

electric railway", hence the question to be determined was purely a question of fact. The Court stated at pages 180, 181:

> "As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination after hearing and upon evidence, conclusive."

Again in the case of *Sunshine Anthracite Coal Co. v. Adkins; supra*, we find the question turned on whether or not coal being mined by the appellant was "bituminous coal", the answer to which in turn determined whether or not Adkins came within the purview of the Bituminous Coal Act. The term "bituminous coal" was definitely defined by the Act and as in the *Shields* case the meaning of the term did not appear to be in question. The Court held in effect that Congress could delegate to the Commission the determination of the question of fact, and (p. 400):

> "That guide (the act and definitions) is *sufficiently precise*[12] for an intelligent determination of the ultimate questions of fact by experts."

It could scarcely be contended that the definition of the word "employee" in the National Labor Relations Act is "sufficiently precise" or precise at all, save as it clearly established the intent of Congress to use the word in its customary, conventional and legal sense.

It is respectfully submitted that no conflict of decisions results from the decision of the Court below in the case at bar.

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[12] Emphasis ours.

POINT II.

Evidence to Justify Findings of an Administrative Body Means Substantial Evidence.

The rule that the evidence adduced must be substantial evidence or reasonably persuasive evidence—that a mere scintilla of evidence is insufficient—is well established by a long line of decisions of this Court. Thus, in the case of *National Labor Relations Board v. Columbia Enameling & Stamping Co.*, 306 U. S. 292 (decided February 22nd, 1939), Mr. Justice Stone, after completely analyzing the evidence adduced at the original hearing respecting the sufficiency thereof to justify the order of the Board requiring the discharge of certain employees and directing respondent to discontinue refusing to bargain collectively, in connection with his discussion of Section 10 E of the Act—

> "The findings of the Board as to the facts, if supported by evidence, shall be conclusive"

stated at page 299 as follows:

> "But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is *substantial*, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred." (Emphasis supplied.)

Various cases were cited, including *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, wherein the Court stated, at page 300:

> "Substantial evidence is *more than a scintilla*, and must do more than create a suspicion of the fact to

be established. It means such relevant evidence as a reasonable mind might accept as *adequate to support a conclusion* . . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." (Emphasis supplied.)

Again, in the case of *National Labor Relations Board v. Boss Manufacturing Co.*, 107 Fed. (2d) 574 (decided November 7th, 1939 in the Circuit Court of Appeals, 7th Circuit), we find the same doctrine pronounced.

The case came before the Court upon petition of the Board for an order for enforcement. The Court thoroughly analyzed the evidence, and in discussing the sufficiency thereof to justify the findings in question, the Court stated, at page 578:

> "True it is, the findings of the Board are conclusive *if supported by the evidence*—29 U. S. C. A., paragraph 160—but it is a *question of law* as to whether there is sufficient evidence to support the Board's findings of fact." (Emphasis supplied.)

Citing sundry cases, including *Consolidated Edison* (*supra*), and *Columbian Enameling & Stamping Co.* (*supra*), and quoting with approval from the *Columbian* case the same provision hereinabove quoted by this respondent.

National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co., 135 Fed. (2d), page 15 (decided by the Circuit Court of Appeals, 3rd Circuit, March 31st, 1943). In discussing the question of the sufficiency of

evidence to support the findings of the Board, the Court stated, after analyzing the evidence, as follows (p. 25):

> "While it is for the Board, therefore, to find the facts and to draw material inferences from the evidence (citing various cases) it is for a reviewing Court to say *whether the Board's findings are supported by substantial evidence*, and whether its conclusions are reasonably inferable from the evidence which it accredited." (Emphasis supplied.)

In this case the Court found that the evidence was not sufficient to sustain the findings.

The same doctrine is pronounced in the case of *National Labor Relations Board v. Goshen Rubber & Manufacturing Co.*, 110 Fed. (2d) 432 (decided February 24th, 1940, in the Circuit Court of Appeals, 7th District), wherein the Court again declares that the findings must be supported by substantial evidence acceptable to a reasonable mind as adequate to support a conclusion—citing the *Consolidated Edison* (*supra*) case, and sundry other cases.

Also see the following cases, holding to like effect:

National Labor Relations Board v. Sterling Electric Motors, 109 Fed. (2d) 194;

Gunning v. Cooley, 281 U. S. 90.

POINT III.

The Word "Employee" Was Used by Congress in the National Labor Relations Act in Its Long Established and Conventional Sense.

Section 2(3) of the Act defines the word "employee" as follows:

> "The term 'employee' shall include any employee and shall not be limited to the employees of a particular employer unless the Act explicitly states otherwise . . . ." (exceptions and inclusions follow—not of importance in this case).

It is significant that acting under authority conferred upon it by the Act respecting the making of rules and regulations, the Board in its rules and regulations, 29 U. S. C. A. 561, Sec. 201.1, merely stated in defining the word "employee" that such word:

> ". . . as used herein shall have the meaning set forth in Section 2 of the National Labor Relations Act."

Reaffirming, as it were, the intention to use such word in its ordinary, long established and conventional sense.

It is respectfully urged that the so-called "definition" of the word "employee" in the Act neither added to nor detracted from the conventional use of that word.

Petitioner would enlarge the conventional and well-established meaning of the word "employee" by having it include all persons involved who

> ". . . function in a realistic economic sense as employees. . . ." [R. 1847.]

To integrate such a provision with the definition of "employee", declared by Congress, would be to nullify Congressional intent and would result in administrative rather than Congressional made law. That the term "employee" has a well established and conventional meaning and refers to a *legal* relationship, can scarcely be questioned.

The primary purpose for the enactment of the National Labor Relations Act was to regulate labor relations, *i. e.*, the relationship between employers and employees. The conclusion is almost irresistible that Congress, had it intended the Act to embrace employees other than those denoted by the use of the word in its common and conventional sense, would assuredly, in framing the definition of such word, expressed such intent.

Thus, in the case of *Jones v. Goodson* (10 C. C. A.) 121 F. (2d) 176, 180, the Court states:

> "It must be presumed that Congress was cognizant of its well-established principles at the time of the enactment of the statute and that if different guides were intended for ascertaining whether the relationship of employer and employee existed between parties in the application of the statute, appropriate language would have been used to indicate such purpose. There is nothing in the act or its legislative history to indicate such an intent."

In determining the meaning of the word "employee" under the Federal Employers Liability Act (U. S. C. A. Title 45, Sec. 51) in the case of *Robinson v. Baltimore & Ohio R. R. Co.*, 237 U. S. 84, at 94, 59 L. Ed. 849, at 853, the Court stated:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in

their natural sense and intended to describe the conventional relation of employer and employee."

Similar pronouncement was made by the Court in construing the term "employment" as used in the Federal Social Security Act of 1935 in the case of *Kentucky Cottage Industries v. Glenn*, 39 Fed. Supp. 642, at 645.

Again in the case of *McDonald v. United States* (8 C. C. A.) 89 F. (2d) 128, at 133, the Court states:

". . . It is well settled that when a statute uses words whose meaning under judicial decisions has become well known and well settled it *will be presumed*[13] that the legislature used such words in the sense justified by long judicial sanction."

Sanborn v. Commissioner (8 C. C. A.) 88 F. (2d) 134, at 137, certiorari denied, 301 U. S. 700, quoting from the Opinion:

". . . 'The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity of an acute and powerful intellect would discover' has received the approval of the Supreme Court and is now well settled."

This pronouncement would appear to be particularly applicable to the contention of petitioner that the word "employee" should be so construed as to bring within its meaning all persons who "function in a realistic economic sense as employees." It is earnestly urged that such a contention should not be upheld.

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[13]Emphasis ours.

Conclusion.

It is submitted that the petition for a Writ of Certiorari should be denied for the reason that there is no conflict of decisions between the case at bar and the cases relied upon by petitioner as reflecting such conflict.

Respectfully submitted,

THOMAS S. TOBIN,

Attorney for Respondent Stockholders Publishing Company, Inc.

BINFORD & BINFORD,
L. B. BINFORD,
HOWARD M. BINFORD,
Of Counsel.